

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 19, 2015

**BARRY MICHAEL SPENCER, II v. CHRISTINA MARIE SPENCER**

**Appeal from the Chancery Court for Montgomery County**  
**No. MCCHCVDI130000427    Laurence M. McMillan, Jr., Chancellor**

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**No. M2014-01601-COA-R3-CV – Filed February 25, 2016**

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In this appeal, a mother challenges the trial court’s award of equal parenting time to the child’s father. The mother contends she should be awarded more parenting time because, among other things, she was the child’s primary caregiver during the parties’ marriage. We have reviewed the record and find that the trial court did not abuse its discretion in naming mother the primary residential parent and awarding equal parenting time to the parties.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Stacy A. Turner, Clarksville, Tennessee, for the appellant, Christina Marie Spencer.

Steven C. Girsky, Clarksville, Tennessee, for the appellee, Barry Michael Spencer, II.

**OPINION**

Christina Marie Spencer (“Mother”) and Barry Michael Spencer, II (“Father”) married on March 22, 2010; one daughter was born of the marriage in July 2012. Mother also has two older children from a previous marriage. Mother and Father are both employed as paramedics. Father’s work schedule requires him to work a rotating shift of twenty-four hours on and forty-eight hours off. Following a nine-month maternity leave, Mother returned to work as a part-time paramedic and works a rotating twenty-four-hour shift followed by forty-eight hours off. In addition, Mother’s schedule allows her one full week off from work every four weeks.

Father filed a complaint for divorce on October 14, 2013. The parties attended mediation and resolved all issues related to the division of property; however, the parties were unable to agree on a parenting plan for their daughter. Mother filed an answer on January 31, 2014. The trial court held a hearing to address the parenting plan on February 4, 2014. Father, the child's paternal grandmother, Father's co-worker, Mother, and the child's maternal grandmother testified at the hearing. The testimony of the parties was summarized in a statement of the evidence which the trial court approved on December 22, 2014.

Father testified that he resided with his mother and that she could provide childcare for his daughter during his twenty-four hour work shifts. He stated that Mother "was not facilitating a healthy, stable and nurturing relationship between him and the . . . child." On cross examination, Father explained that he would "often times play video games or visit the gym" instead of caring for the child on his days off work, "because the Mother had insisted that [maternal grandmother] should stay with the children, including [the parties' daughter]." Father testified that he took prescription medication for a depression disorder. He stated that his depression was situational and was "specifically associated with the degradation of the parties' marriage and the alienation of affection of the Wife . . . ." He acknowledged that he had kicked through a door, punched holes in the walls of the marital residence, and caused damage to the dishwasher and entertainment center during angry outbursts; however, he stated that Mother had also caused property damage during arguments.

The paternal grandmother testified that she was willing and able to assist Father with childcare while he was on his twenty-four-hour work shifts. She testified that she had hypertension and diabetes but that her medical issues are "under control" and would not interfere with her ability to care for the child. She testified that Mother had always been "rude and abrupt with her" and that she was not permitted the same time with the child as the maternal grandmother.

Anna Gipson, Father's co-worker, testified next. She stated that she had visited the marital residence and believed Father was "very loving" toward his daughter. On cross-examination, Ms. Gipson explained that Father:

had a reputation for having a temper and having volatile behaviors in the EMS community. As such, she admitted that [Father] had various nicknames, such as "Scary Barry", "Bi-Polar Barry", and "Barry or Larry" but that he was never reprimanded or in trouble to her knowledge for any issues.

Ms. Gipson also stated that she had no reason to believe Mother was not a good parent.

Mother testified that she has always been the child's primary caregiver, that she was the one who got up with the child during the night, and that she took the initiative to make doctor appointments for the child. Mother testified that it was Father who requested that the child stay with her maternal grandmother, even when he was not working and available to care for her. Mother stated that during the parties' separation, from November 2012 through January 2013, Father only visited the child for a couple of hours each week and had no overnight visits with the child. Mother testified that Father did not take his medication as prescribed and that there were instances where Father would "grab her and push her out of the way, in anger" during their arguments. Regarding Father's quick temper, Mother testified that he "put holes in the wall, broke a cell phone, threw a computer off the bed, . . . broke the dishwasher when the children weren't putting the dishes away properly and broke the door to the entertainment center . . ." Photographs of the damage were introduced into evidence. Mother stated that in November 2013, after it became clear that the parties were not going to reconcile, Father purchased a crib and began enjoying overnight visitation with the child every third day while Mother worked. Mother stated that the child has a "very close relationship" with her half-siblings and has "an especially strong bond" with Mother.

On cross-examination, Mother admitted to asking Father to terminate his rights to the child. Mother reiterated that it was Father's choice not to care for the child during her twenty-four-hour work shifts, and she denied keeping the child away from Father to harm him intentionally. Mother admitted that she had been terminated from the Montgomery County Emergency Medical System prior to the child's birth. Mother conceded that during the heat of an argument, she kicked in a door and stated, "See I can do that too." When asked why she believed the every-other-week parenting schedule proposed by Father was not in the best interest of the child, she replied that she believed the child "needed to spend more time with her siblings and with her Mother who had been her primary caregiver." Mother stated she did not believe Father had a significant bond with the child. Mother explained her desire that the parties continue the schedule where Father exercised parenting time "in small increments which would not frustrate [his] temper."

Finally, the maternal grandmother testified. She stated that she provided childcare for the child and the child's step-siblings while Mother worked, even when Father was off work and available to care for the children. She stated that Mother was the primary caregiver. She also testified that she witnessed Father's temper and had seen the damage he had caused to the marital residence. On cross-examination, she denied having made any derogatory comments about Father in front of the children.

The trial court entered a memorandum opinion on March 14, 2014, naming Mother the primary residential parent, awarding Mother 183 days per year with the child, and awarding Father 182 days per year with the child. The court ordered the parties to exercise parenting time every other week, with exchanges taking place on Saturday at noon. The trial court considered the factors set forth at Tenn. Code Ann. § 36-6-404(b), and made findings that most factors weighed equally in favor of both parties. However, the court found that Father “has exhibited the greatest effort to facilitate and encourage a close relationship between the child and the other parent.” The court acknowledged that Father “does take depression/anxiety medication, but this is not an issue as it relates to his ability to parent and care for the child.” Finally, the court stated:

Father has a true desire to equally parent the child and share the responsibilities with the Mother. The Mother does not have the same desire for equal parenting. The Mother’s desire to have more time than the Father is unreasonable in the court’s opinion, and not in the child’s best interest.

The trial court entered the final decree of divorce and parenting plan on April 16, 2014. Mother filed a motion to alter or amend the final decree on May 13, 2014, which the trial court denied by order entered on July 15, 2014. Mother appeals.

#### STANDARD OF REVIEW

Our review of the trial court’s findings of fact is de novo, with a presumption that the findings are correct unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). We review issues of law de novo, giving no presumption of correctness to the trial court’s conclusions. *Armbrister*, 414 S.W.3d at 692. Trial courts have “broad discretion” to fashion parenting plans, as the Tennessee Supreme Court has explained:

Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, *Holloway v. Bradley*, 190 Tenn. 565, 230 S.W.2d 1003, 1006 (1950); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997), trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). Thus, determining the details of parenting plans is “peculiarly within the broad discretion of the trial judge.” *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). “It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than

the trial court.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). A trial court’s decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. *Id.* “An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011).

*Id.* at 693. Thus, the *Armbrister* Court concluded, an appellate court will not find that a trial court has abused its discretion unless the trial court’s parenting arrangements “‘fall[] outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.’” *Id.* (quoting *Eldridge*, 42 S.W.2d at 88).

#### ANALYSIS

Mother asserts that the trial court erred in awarding Father an equal amount of parenting time with the parties’ daughter. Specifically, she argues that the trial court abused its discretion because “the weight of the evidence and the record as a whole was contrary to the [c]ourt’s findings.”

When a court makes a determination regarding a child’s residential arrangements, it must make a “custody determination” that is based on the child’s “best interest.” Tenn. Code Ann. § 36-6-106(a) (2013). In ascertaining the child’s best interest, the court is directed to allow each parent “to enjoy the maximum participation possible in the life of the child consistent with the factors set out in subdivisions (a)(1)-(10), the location of the residences of the parents, the child’s need for stability and all other relevant factors.” *Id.*; *see also* Tenn. Code Ann. § 36-6-401(a) (“The general assembly recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child’s best interests.”).

In ruling that the parties should share equal parenting time, the trial court considered the factors found at Tenn. Code Ann. § 36-6-404(b)<sup>1</sup> and discussed the child’s

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<sup>1</sup> The trial court applied the factors set forth in Tenn. Code Ann. § 36-6-404(b) (2013), which apply to the court’s determination of a parenting plan and residential schedule. The task before the trial court was to determine the child’s best interest in the course of making an “initial custody determination.” Tenn. Code Ann. § 36-6-106. Although the trial court should have applied the factors at Tenn. Code Ann. § 36-6-106 in this case, our Supreme Court has acknowledged that “[s]ignificant overlap exists” between the two sets of factors.” *Armbrister*, 414 S.W.3d at 697. Here, the analysis and result would be substantially similar if not the same regardless of which set of factors the court applied. *See Thompson v.*

best interests as follows:

8. When a court is asked to formulate a parenting plan for parents who cannot come to an agreement on how to best parent their child, the court must take the following factors into consideration:

a. The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult. The court finds for both parties equally on this factor.

b. The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child. The child has a strong relationship with both parents. During the earlier part of the child's life the Mother took on greater responsibility to perform the parenting needs for the child, but since the parties['] separation, the Father has taken on a greater role with the daily needs of the child.

c. The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child. The Father has exhibited the greatest effort to facilitate and encourage a close relationship between the child and the other parent.

d. Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings. The court finds this factor is not applicable in this case.

e. The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care. The court finds for both parties equally on this factor.

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*Thompson, III*, No. M2011-02438-COA-R3-CV, 2012 WL 5266319, at \*6 (Tenn. Ct. App. Oct. 24, 2012); *Dobbs v. Dobbs*, No. M2011-01523-COA-R3-CV, 2012 WL 3201938, at \*1, n.1 (Tenn. Ct. App. Aug. 7, 2012). Effective July 1, 2014, the General Assembly amended the language of Tenn. Code Ann. § 36-6-404(b) to state, "If the limitations of § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the factors found in § 36-6-106(a)(1)-(15)." The amendment also deleted subdivisions (1)-(16) of § 36-6-404(b). The present action was instituted prior to the amendment; therefore, for the sake of consistency, we will consider the sixteen factors of Tenn. Code Ann. § 36-6-404(b) (2013) which were applied by the trial court.

f. The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities. The Mother has been the primary caregiver for the child.

g. The love, affection, and emotional ties existing between each parent and the child. The court finds for both parties equally on this factor.

h. The emotional needs and developmental level of the child. The emotional needs and developmental level of the child are normal for an 18-month old child.

i. The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child. The court finds for both parties equally on this factor. The Father does take depression/anxiety medication, but this is not an issue as it relates to his ability to parent and care for the child.

j. The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities. The child in this matter has two stepsiblings, both males, ages twelve (12) and eight (8). Due to the child's young age, she has yet to develop a close relationship with her siblings.

k. The importance of continuity in the child's life and the length of time the child has lived in a stable, unsatisfactory environment. The court finds that the parties have provided a stable environment for the child even through their separation.

l. Evidence of physical or emotional abuse to the child, to the other parent or to any other person. There is no evidence of any type of abuse to the child, to the other parent or to any other person involved in this matter.

m. The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child. There is no significant issue regarding any person who resides in or frequents the home of either parent and who has interaction with the child.

n. The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request.

The preference of older children should normally be given greater weight than those of younger children. This factor is not applicable.

o. Each parent's employment schedule, and the court may make accommodations consistent with those schedules. Both parents live in Montgomery County, approximately 15 miles apart. The Father works for Montgomery County EMS and his work hours have a rotating schedule of 24 hours at work followed by 48 hours off work. The Mother is employed by Dickson County EMS and shares the same rotating work schedule as the Father, with the exception of five (5) straight days off once per month.

p. Any other factors deemed relevant by the court. The court finds the Father has a true desire to equally parent the child and share the responsibilities with the Mother. The Mother does not have the same desire for equal parenting. The Mother's desire to have more time than the Father is unreasonable in the court's opinion, and not in the child's best interest.

Mother contends the trial court failed to place the appropriate weight on several factors, including the fact that she has been the child's primary caregiver. We have reviewed the statement of the evidence approved by the trial court and have considered Mother's arguments regarding the weight the trial court assigned to particular factors. In sum, we cannot say the trial court abused its discretion in devising a residential schedule that allows both parties "to enjoy the maximum participation possible in the life of the child." Tenn. Code Ann. § 36-6-106(a). In reaching this conclusion, we are mindful of the broad discretion trial judges hold in fashioning parenting arrangements, especially given their ability to "observe the witnesses and make credibility determinations." *Massey-Holt v. Holt*, 255 S.W.3d 605, 607 (Tenn. Ct. App. 2007). Several issues were in dispute, including whether Father voluntarily relinquished the ability to care for the child on Mother's days off from work, or whether Mother insisted that the child be cared for by the maternal grandmother rather than Father. The trial court seemed to believe Father on this point and determined that Mother's desire to have more parenting time with the child was "unreasonable." The court also expressly determined that Father's depression is "not an issue as it relates to his ability to care for the child." Indeed, there was no testimony or evidence that his angry outbursts were ever directed at the child at the center of this dispute. The result reached by the trial court is not outside the spectrum of rulings that reasonably results from applying the correct legal standards to the evidence. Therefore, we decline to "tweak" the parenting plan in the hopes of achieving a more reasonable result. *See Eldridge*, 42 S.W.3d at 88.

## CONCLUSION

The trial court's ruling is affirmed. Costs of the appeal are assessed against Mother, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE